

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Comcast Cable Communications, LLC)	CSR 7159-E
)	
Petition for Determination of Effective)	
Competition in 7 Washington Franchise Areas)	

MEMORANDUM OPINION AND ORDER

Adopted: March 3, 2011

Released: March 4, 2011

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Comcast Cable Communications, LLC, hereinafter referred to as “Petitioner,” has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission’s rules for a determination that Petitioner is subject to effective competition in seven franchise areas in the State of Washington. The seven franchise areas in question are listed on Attachment A and are hereinafter referred to collectively as the “Communities.” A grant of the petition would end regulation of Petitioner’s basic cable service by local franchise authorities in the Communities.

2. Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended (the “Act”)¹ and the Commission’s implementing rules,² and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and Dish Network (“Dish”). The franchise authorities in two of the Communities, the City of Vancouver and Clark County (collectively, the “Authorities”), filed an Opposition.³ Two more of the Communities, the Cities of Camas and Washougal, support the Opposition although they do not join in it formally.⁴ Petitioner filed a Reply to Opposition (“Reply”). Later correspondence between the Commission and Petitioner clarified and corrected some data in ways that are reflected in Attachment A.

3. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁵ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission’s rules.⁶ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present

¹ See 47 U.S.C. § 543(a)(1).

² 47 C.F.R. § 76.905(b)(2).

³ Opposition of the City of Vancouver and Clark County, Washington to Comcast’s Petition for Special Relief (“Opposition”). All the Communities requested an extension of time in which to prepare their opposition, which the Commission granted for good cause shown. Clark County is objecting to the grant of the Petition only for the County’s unincorporated areas. See Petitioner’s Reply to Opposition (“Reply”) at 4 n.10.

⁴ Opposition at Exhs. 2, 4.

⁵ 47 C.F.R. § 76.906.

⁶ See 47 U.S.C. § 543(l) & 47 C.F.R. § 76.905.

within the relevant franchise area.⁷ For the reasons set forth below, we grant the petition based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

II. THE COMPETING PROVIDER TEST

4. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.⁸ This test is referred to as the “competing provider” test.

A. Part One

5. The first part of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.⁹ It is undisputed that the Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.¹⁰ The Commission has held that a party may use evidence of penetration rates in the franchise area (the second part of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.¹¹ We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Communities to support their assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.¹² The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming¹³ and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.¹⁴ Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.¹⁵ Accordingly, we find that the first part of the competing provider test is satisfied in all the Communities.

⁷ See 47 C.F.R. §§ 76.906 & 907.

⁸ 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁹ 47 C.F.R. § 76.905(b)(2)(i).

¹⁰ See Petition at 3.

¹¹ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹² 47 C.F.R. § 76.905(e)(2).

¹³ See 47 C.F.R. § 76.905(g). *See also* Petition at 4.

¹⁴ See Petition at Exh. 2.

¹⁵ See *id.* at 2.

B. Part Two

6. The second part of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in some of the Communities, and that in others both it and the DBS providers have subscribership exceeding 15 percent.¹⁶ Petitioner correctly asserts that, assuming the validity of the subscribership numbers discussed below, it is subject to effective competition in the latter Communities. If Petitioner is the largest MVPD there, then the DBS providers' subscribership exceeds 15 percent, and if one of the DBS providers is the largest MVPD, then the subscribership of Petitioner and the other DBS provider exceeds 15 percent. Either way, the subscribership of the MVPDs other than the largest one exceeds 15 percent.¹⁷

7. The second part of the competing provider test requires the petitioning cable operator to calculate a ratio for each community, the numerator of which is the number of subscribers to MVPDs other than the largest one¹⁸ and the denominator of which is the number of households there. Only if the ratio exceeds 15 percent has the cable operator satisfied the competing provider test.

1. Petitioner's Evidence

8. Petitioner developed its numerator for the statutory ratio by first listing the five-digit zip codes all or part of which lie within one of the Communities. Petitioner then purchased a subscriber tracking report from the Satellite Broadcasting and Communications Association ("SBCA") that identified the number of subscribers attributable to the DBS providers within each such zip code.¹⁹ For the zip codes that lie partly within a Community and partly outside it ("partial zip codes"), Petitioner retained Media Business Corp. ("MBC") to develop an allocation factor that estimates the number of DBS subscribers in the parts of the partial zip codes that lie within the Community.²⁰ Finally, Petitioner added all the DBS subscribers in zip codes lying within each Community and the subscribers allocated to the Community parts of partial zip codes. The sum of these numbers is Petitioner's estimate of DBS subscribers in each Community.

9. Petitioner developed its denominator for the statutory ratio – the number of households in each Community – by taking the number of households in each Community as stated by the 2000 U.S. Census.²¹ The resulting ratios show DBS subscribership in each Community to be well in excess of 15 percent, including 21.61 percent in the City of Vancouver and 37.96 percent in Clark County. These and other material numbers are shown in Attachment A. In the absence of substantial evidence of flaws great enough to lower DBS subscribership below the statutory minimum, Petitioner's satisfy the second part of the competing provider test for each Community.

¹⁶ See *id.* at 5.

¹⁷ See *Charter Commun.*, 21 FCC Rcd 1208, 1210, ¶ 5 (2006).

¹⁸ In the interests of simplicity, our discussion will assume that the MVPDs other than the largest one in each Community are the DBS providers, although in some cases those may be one DBS provider and Petitioner. In the two Communities that oppose the petition, there is no doubt that the MVPDs other than the largest one are the DBS providers.

¹⁹ Petition at 5.

²⁰ *Id.* at 5-6.

²¹ *Id.* at 7 & Exh. 7.

2. The Authorities' Arguments

10. Concerning the numerator of the statutory ratio (DBS subscribers), the Authorities object to Petitioner using five-digit zip codes and an allocation factor for the partial zip codes. The Authorities argue that Petitioner should have used more precise "Zip+4" nine-digit zip codes, which would have dispensed with the need for allocation factors for the partial zip codes.²² We reject the Opposition's argument. We have long accepted Petitioner's five digit zip code and allocation methodology, and have consistently refused to require numbers based on nine-digit zip codes.²³ The Authorities have given us no reason to narrow our standards.²⁴

11. Concerning the denominator of the statutory ratio (households), the Authorities object to Petitioner's use of 2000 Census data and DBS subscriber numbers from several years later. The Authorities allege that their Communities have "grown significantly" since 2000.²⁵ This implies that Petitioner's numerators are not only stale but inaccurately small, leading to an overstatement of DBS subscribership. The Authorities argue that Petitioner should have used more recent household data from the Washington State Office of Financial Management.²⁶ The Authorities do not supply that data, however, or give a reference to it, or indicate how its use would lower DBS subscribership below the statutory minimum. We have long accepted showings of effective competition that use recent subscribership data and Census data that is several years old. We have stated repeatedly that we will accept household numbers that are more recent than Census numbers and are equally reliable (that is, a measure of "households" as defined by the Census).²⁷ The Authorities have given us no such numbers, however. Their vague claims and unspecific objections do not undermine Petitioner's use of 2000 Census numbers for household numbers in the Communities.

12. Concerning both the numerator and the denominator, the Authorities object that Petitioner's franchise area, which is the space within which effective competition is measured, includes some areas where there is no cable service. In these areas, the Authorities appear to claim, DBS is relatively popular and the areas' inclusion in the numbers unnaturally overstates DBS subscribership.²⁸ This objection is without merit. Section 628(l)(1)(B) of the Act specifies that the pertinent area for measuring effective competition is the cable operator's "franchise area," without reference to whether cable service is actually provided throughout it.²⁹ There is no doubt that Petitioner's numbers are derived

²² Opposition at 4 & Exh. 5 (Declaration of Richard D. Treich in Support of Vancouver/Clark County's Opposition to Comcast's Petition for Special Relief) ("Treich Declaration") at ¶ 8.

²³ See Public Notice DA 09-1361, *Commission Clarifies Standards for Evidence of Competing Provider Effective Competition for Cable Service*, 24 FCC Rcd 8198 (2009); *Comcast Cable Commun. LLC*, 22 FCC Rcd 694, 699, ¶ 12 (2007) ("*Comcast*").

²⁴ Nor did the Authorities independently purchase Zip+4 data from SBCA and conduct an independent analysis.

²⁵ Opposition at 4.

²⁶ *Id.* at 4-5.

²⁷ *Comcast Cable Commun., LLC*, 24 FCC Rcd 1780, 1783-84, ¶ 13 (2009); *Adelphia Cable Commun.*, 22 FCC Rcd 4458, 4462, ¶ 14 (2007); *Bright House Networks, LLC*, 22 FCC Rcd 4390, 4393, ¶ 11 (2007); *Bright House Networks, LLC*, 22 FCC Rcd 4161, 4165, ¶ 11 (2007).

²⁸ Opposition at 5 & Exh. 4 (Declaration of Donna M. Mason in Support of Vancouver/Clark County's Opposition to Comcast's Petition for Special Relief) ("Mason Declaration") at ¶¶ 5-6.

²⁹ 47 U.S.C. § 543(l)(1)(B). An exception is where the cable operator has "re-defined" its franchise area to be smaller than that originally granted. See generally *New Hanover County, North Carolina*, Memorandum Opinion & Order DA 08-2344 at ¶¶ 7-8 (rel. Oct. 24, 2008), available a 2008 WL 4693164. The Authorities do not invoke this exception here, however, and we see no indication that it is applicable.

from its franchise area³⁰ and, in that respect, they are precisely what the Act requires.

13. The Authorities also express general doubts about MBC's methodology for estimating the numbers of DBS subscribers in the Community parts of partial zip codes.³¹ Conspicuous by its absence from Authorities' Opposition, on this and their other objections, is any affirmative evidence. The Authorities give no indication of what would be a better allocation methodology, superior DBS subscriber or household numbers, or what subscribership calculations would result from them. These absences are remarkable given the Authorities' familiarity with their Communities and the extension of time granted them to prepare their Opposition. The Authorities' vague objections, although numerous, are insufficient to overcome the Petitioner's objective evidence.³² Petitioner's evidence, in the absence of any countervailing evidence or convincing argument by the Authorities, sustains its burden of proof.³³

14. Finally, the Authorities raise general objections to the petition, arguing that deregulation of basic service rates would be against the public interest because it might lead to various undesirable consequences.³⁴ The Authorities argue that Section 76.7(a)(4)(i) of our rules, which requires that petitions support a determination that a grant of the relief requested "would serve the public interest,"³⁵ requires that we expand the issues in effective competition proceedings to include anything that can be fitted within the term 'the public interest.' We reject the Authorities' request that we expand effective competition proceedings into free-ranging investigations of future possibilities. The "public interest" words in Section 76.7(a)(4)(i) of our rules do not open the door to all the extraneous and hypothetical issues that may arise between a cable operator and a franchise authority. The general words "public interest" are qualified by the Congress's narrowly drafted statutes about effective competition and by the rules and decisions we have adopted implementing Congress's intent.³⁶ None of the Authorities' suggested public interest issues are mentioned in the pertinent statutes or rules. There is no statutory basis to delay deregulation of rates for basic service in a franchise area until the arrival of perfect competition there and the resolution of all issues between a cable operator and a franchise authority to the latter's satisfaction. Indeed, Section 623(b)(1) of the Act sets the standard for basic cable rates not at perfect competition, but at the level no higher than would be charged if there were effective competition.³⁷ Accordingly, we reject the Authorities' proposal that we expand the scope of this proceeding to include

³⁰ Reply at 4.

³¹ Treich Declaration at ¶¶ 6-7.

³² See, e.g., Mason Declaration at ¶ 6 (certain numbers not stated by the Authorities "would indicate that there is the potential for substantial error"). Indeed, Petitioner claims that even if some of the Authorities' suggested revisions to its numbers were made, DBS subscribership would still exceed the statutory minimum. Reply at 4-7.

³³ See, e.g., *Comcast*, 22 FCC Rcd at 699, ¶ 14:

"By allowing Comcast to use [certain] data, the Commission is not shifting the burden of proof to the City; however, once Comcast has satisfied its burden of proof, the City can no longer simply rely on the presumption of no effective competition. While the Commission understands that filing an opposition can be a time-consuming and costly endeavor, such a requirement does not imply that the petitioner's filing is viewed with deference."

³⁴ These include the possibilities of higher rates, different rates for different areas, and decreased availability of local news and Public, Educational and Government channels. Opposition at 5-9 & Mason Declaration at ¶¶ 7-10.

³⁵ 47 C.F.R. § 76.7(a)(4)(i).

³⁶ Reply at 8.

³⁷ 47 U.S.C. § 543(b)(1).

any issue that can fit within the term “public interest.”³⁸

3. Conclusion

15. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data, as reflected in Attachment A, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. Therefore, the second part of the competing provider test is satisfied for each of the Communities. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

III. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Comcast Cable Communications, LLC, **IS GRANTED**.

17. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

18. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.³⁹

FEDERAL COMMUNICATIONS COMMISSION

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³⁸ Likewise, we would deny any attempt by a cable operator to hasten deregulation of rates for basic service, before any of Section 623(1)(1)’s criteria were met, because of possible consumer benefits that would result from premature deregulation.

³⁹ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 7159-E

COMMUNITIES SERVED BY COMCAST CABLE COMMUNICATIONS, LLC

Communities	CUIDs	CPR*	2000 Census Households	Estimated DBS Subscribers
Camas, WA	WA0273	34.37%	4,480	1,540
Vancouver, WA	WA0347	21.61%	56,628	12,236
Clark County, WA	WA0348	37.96%	58,079	22,044
La Center, WA	WA0365	67.39%	552	372
Ridgefield, WA	WA0368	47.50%	739	351
Washougal, WA	WA0430	50.85%	3,294	1,675
Battle Ground, WA	WA0444	62.29%	3,071	1,913

*CPR = Percent of competitive DBS penetration rate.